BC

TO: Members, Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform and Housing
Members, Assembly Committee on Housing

FROM: Amy L. Boyer, on behalf of Wisconsin Mortgage Bankers Association

DATE: October 7, 2009

RE: Comments to Senate Bill 255

The Wisconsin Mortgage Bankers Association (WMBA), a statewide association of more than 400 mortgage lending professionals, offers the following comments on Senate Bill 255, relating to foreclosure mediation. While we appreciate the efforts of Sen. Lena Taylor on this well-intentioned bill, we have some technical concerns relating to the notice requirements and other items contained in the proposal.

Before providing comments about the bill's specific provisions, we bring your attention to a recent report studying similar state and local programs requiring mediations or conferences before foreclosure sales take place. After reviewing 25 mediation programs in 14 states, the non-profit National Consumer Law Center reported that "there is as yet no data to confirm that foreclosure-mediation programs anywhere have led to a substantial number of affordable and sustainable load modifications."

Again, while we understand and appreciate the Senator's reasons for introducing the bill, below are some specific provisions we would like to bring to your attention.

Notice Requirement Timeline

This section provides that before a mortgagee can foreclose a defaulted mortgage, it must first send a specific notice to the borrower, which must be sent no later than 45 days after the due date of the second missed payment. Then, under § 846.03(2)(c), the bill provides that a court shall dismiss the foreclosure action if the notice requirements under the previous subsection – (2)(a) – are not met. Combined, these two subsections provide that if a mortgagee fails for any reason to send the notice within the 45-day timeframe, the mortgagee loses the option to foreclose. WMBA believes this is a rather harsh result for simply failing to send a notice. Thus, WMBA respectfully requests amending the language to provide a different milestone for sending the notice, such as 45 days before commencing the action.

Legal Description Notice Requirement

Section 846.03(2)(b)(3) of the bill requires that the notice include a legal description of the residential real property that is subject of the first or 2nd mortgage loan. WMBA is concerned that this language will lead to confusion, particularly for servicers. That is because servicers typically do not track the legal description on their servicing systems.

In addition, legal descriptions vary widely in length, from a couple of lines to many paragraphs. Most borrowers are not aware about the way real property is legally described and would gain nothing from seeing the legal description of their property.

In short, WMBA recommends removing the requirement of the notice to include a legal description of the real property because of the confusion it would cause without any benefit to borrower.

Number of Potential Notices to Borrower

The bill does not provide a limit on the number of notices that a lender could potentially be required to send. By way of example, the Wisconsin Consumer Act only entitles a borrower to two notices of right to cure default within a twelve-month period. (See § 425.105(3)). WMBA recommends that a similar limitation be inserted into Senate Bill 255.

Penalties for Not Acting in Good Faith during Mediation Process

Under §846.03(6) of the bill, if a mortgagee is found to be acting in bad faith, the mortgagee can be ordered to pay costs and attorney fees. However, if the borrower acts in bad faith, there is no corresponding penalty. Thus, without penalties enforceable against borrowers acting in bad faith, WMBA is concerned that borrowers will be able to use mediation as a stall tactic. Since borrowers most likely would not be able to pay monetary penalties, a better penalty would be to shorten the redemption period when the borrower acts in bad faith.

Conclusion

While WMBA appreciates the Senator's intentions for introducing this legislation, we have a few concerns that we hope can be addressed prior to the bill's passage. Please feel free to contact me with any questions you may have.

UW Extension
Cooperative Extension

Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing

October 6, 2009
Room 413 North GAR Hall State Capitol

Joint public hearing with the Assembly Committee on Housing Regarding Senate Bill 255

Notification of default and mediation regarding residential real property subject to foreclosure and granting rule-making authority.

Remarks by UW-Extension
UW-Extension responds to community needs with research-based education and partnerships that support Wisconsin families and communities.

Website: http://www.uwex.edu/ces/

Remarks by:

1. Andy Lewis, Professor, University of Wisconsin-Extension, Community Development Specialist, Center for Community and Economic Development

2. Peggy Olive, Associate Professor, Richland County UW-Extension Family Living Agent

3. J. Michael Collins, PhD, Assistant Professor, University of Wisconsin-Madison, Cooperative Extension State Specialist

4. Suzanne Dennik, Consumer and Housing Education Coordinator, Milwaukee County Cooperative Extension / Milwaukee Foreclosure Partnership Initiative Project Manager, City of Milwaukee

Andy Lewis, Professor
University of Wisconsin-Extension, Community Development Specialist, Center for Community and Economic Development
Email. andy.lewis@uwex.edu tel. 608/263/1432

I. Cooperative Extension
- A Division of the University of Wisconsin-Extension, the third largest institution in the University system
- Through our Cooperative partnership with Counties, we have a presence in all 72 Counties
- "UW-Extension extends the knowledge and resources of the University of Wisconsin to people where they live and work"
    - State Specialist role: to provide research that informs the education delivered by county-based faculty

II. From Community Indicators to Community Action
- Center for Community and Economic Development
    - Goal: identify and anticipate trends that are impacting communities
    - In 2007 began tracking foreclosures
        - Response to county faculty
        - Data was not widely accessible for Wisconsin
- Wisconsin Circuit Court Access system was a valuable research tool for this issue
    - Partnership with Russ Kashian, U.W. Whitewater
    - Cooperative Extension Access to Affordable Housing Team

III. Using Foreclosure Data in Wisconsin
- County educators use in Outreach/Education:
    - inform residents and decision makers about the significance of the issue.
- Inform funding decisions
    - NSP funding from federal government
- Monitor data on a statewide and county basis

IV. Current data on foreclosures: the problem is worsening
- Based on quarterly civil foreclosure case data in WCCA (all legal filings in the state)
- Foreclosure cases in the third quarter of 2009 were up 40% over 2008
- Number of cases have increased dramatically *every* year since 2000
- New record for foreclosure cases in Wisconsin in 2009:
    - 21,645 unique foreclosure cases in the first 9 months of 2009
    - Compared to 23,263 for the full 12 months in 2008
    - Especially acute in Milwaukee area but increasing in many areas

V. How do we address rising foreclosures?
- Story of subprime or predatory loans causing all foreclosures not true
    - There are cases some of which require legal remedy
- Unemployment continues to be a major cause of repayment problems
    - Without income repayment becomes a problem
    - Lack of access to credit and soft home values don't help
- Also cases of one wage earner has lost their job or cut in income
- Some issues maybe managed with re-budgeting or re-employment

Exhibit 1

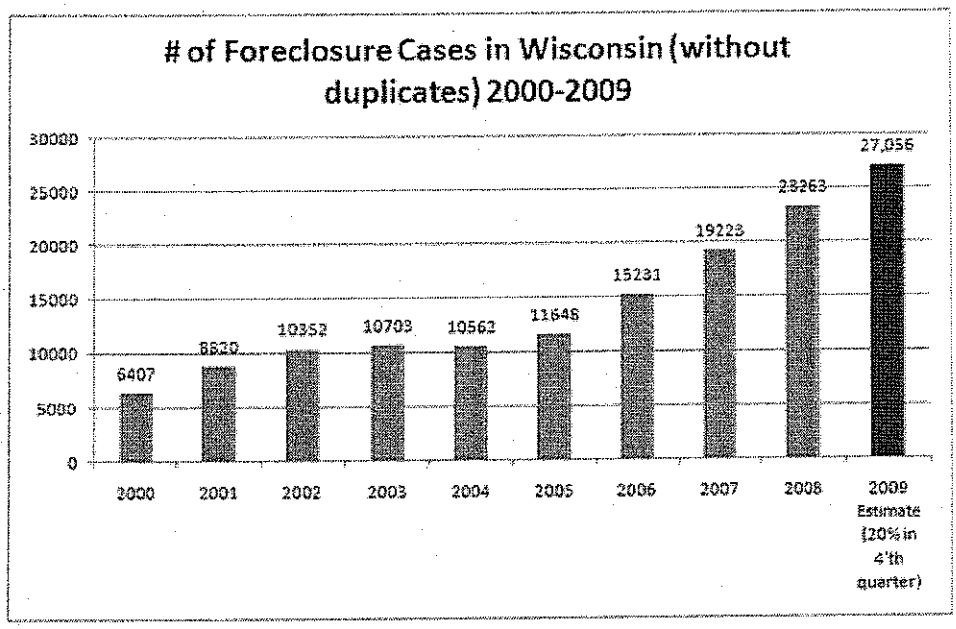
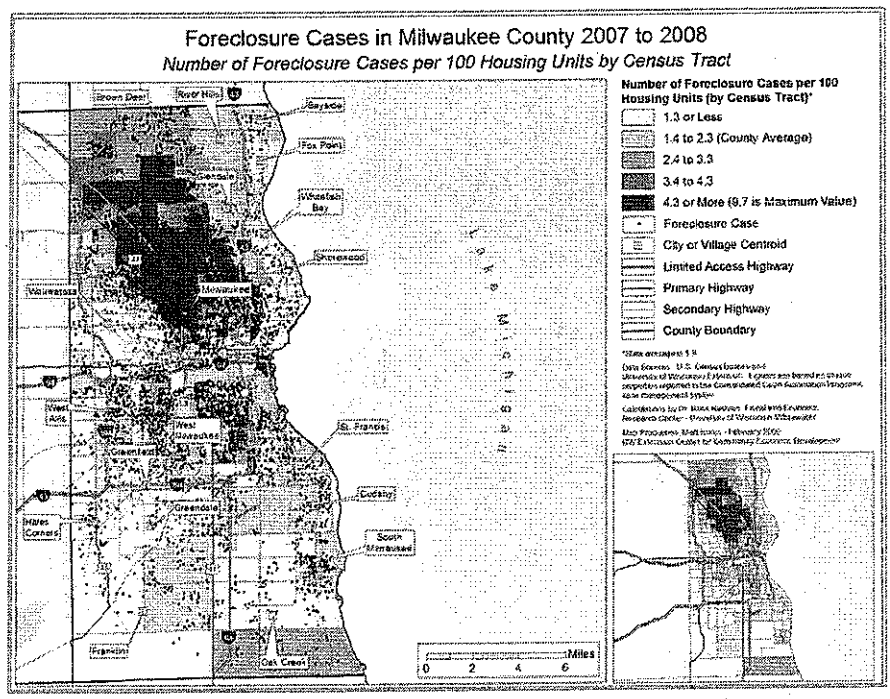


Exhibit 2



University of Wisconsin-Extension

Peggy Olive, Associate Professor
Richland County UW-Extension Family Living Agent
Phone: (608) 647-6148 / e-mail: peggy.olive@ces.uwex.edu

Financial Education for Wisconsin Families

I. The role of a UW-Extension Family Living Educator
   a. Provide research-based education
   b. Support Wisconsin families and communities.
   c. Based on locally identified priorities, existing resources, and current capacities.

II. Responding to Tough Economic Times
   a. Basic consumer education on budgeting and access to financial help
   b. Topics:
      i. Spending
      ii. Consumer credit
      iii. Housing issues
   c. 'Front line' as families deal with difficult financial decisions
      i. Example: Richland County
         1. Managing a Drop in Income
         2. Community-wide partnership
         3. Replicated across the state and shared nationally
      ii. Example: Waushara County
         1. Response to lay-offs and plant closings in
         2. Debt management and foreclosure prevention education to more than 400 households so far in 2009.
   d. Extension faculty are reaching record numbers of individuals and families
      i. At our capacity already and demand is growing

III. More than Education
   a. Partnerships to deal with plant closing, furloughs and declines in farm revenue
   b. Help to develop a financial strategies with other partners
   c. Identify the options and resources available to them.
      i. Example: Iowa County
         1. financial education for first-time homebuyers
         2. budgeting help for troubled homeowners

IV. Addressing Foreclosure
   a. Partnership with financial institutions, housing professionals, school districts, religious organizations, and non-profits agencies.
      i. Examples:
         1. Dane County Foreclosure Prevention Taskforce,
         2. Racine Housing Coalition,
         3. St. Croix Valley Foreclosure Intervention Task Force
         4. Northland Wisconsin Financial Wellness (Douglas County)
   b. Education: The Wisconsin Homebuyer Preservation Education (WHPE) Curriculum
      i. Cooperative Extension leads the way in the development of curricula on personal finance.
      ii. Builds on existing budgeting and debt management resources
         1. understanding the foreclosure process
         2. rights and resources as a homeowner
         3. manage financial obligations, including insurance, tax, and home maintenance issues

V. Limitations and Challenges
   a. Working one-on-one with an individual is extremely time consuming
      i. Extension educators are not HUD counselors
      ii. Extension complements the work of housing counselors and foreclosure mediators in responding to the needs of families.
   b. Workshops and community-based homeownership events still require resources
      i. Current capacity at or above maximum
      ii. Special issues in rural areas

University of Wisconsin-Extension
J. Michael Collins, PhD, Assistant Professor
University of Wisconsin-Madison, Cooperative Extension State Specialist
Email. jmcollins@wisc.edu tel. 608/262/0369

I. Role of Extension
- Research-based responses
- Accurate trust-worthy information to guide implementation

II. Consumer Reactions to Troubled Mortgage Loans
- Reluctant to talk about their problem: feelings of regret, embarrassment & fear
- Stress from physical/emotional problems
- Avoid all bill collectors: Distrust
  - "I was always week to week. I get paid, I pay my bills. I get paid, I pay my bills. Then it's not there. Then you're in trouble. I didn't know which way to turn. I didn't know there was help out there." (African American woman at 2005 focus group)
- Lender/servicer efforts to engage borrowers often fail:
  - "They make you feel like a deadbeat…the way they interrogate you, they seem like they want to catch you in a lie because the questions are repetitious…the only thing I'm going to say is blah, blah, blah. I'm not lying. I need help." (White male at 2005 focus group)

III. There are options:
- Loss Mitigation Plans
- Modifications – legal renegotiation of contract
  - Making Home Affordable: HAMP
- Based on data from 23,000 subprime loans in Wisconsin (private data on loan performance)
  - All appear to be under utilized (Ex 3-4)
  - Modifications or other workouts remain rare
  - Too often repayment plans increase the loan balance owed

IV. Counseling can help
- Incremental effect of each additional hour of counseling of 4.1% lower probability moving from foreclosure start to completion (6 months)
- 2 hours of counseling: ~ 9% reduction per client

Source: Collins, J. M. (2007). Exploring the Design of Financial Counseling for Mortgage Borrowers in Default *Journal of Family and Economic Issues, 28*(2), 207-226

V. Mediation
- May avoid cost and time of court proceedings – benefits all involved
- May result in more consumer-friendly and sustainable plan
  - Principal reduction remains key indicator
- Experiences in 25 communities in 14 states range from small pilots to large well-funded programs (NCLC, Sept 2009
  - Most lack measurable outcomes
  - Key role of outreach and 3rd party counseling
- Education provides background to be at the table as an equal party; Counseling involves advice
  - Both may cover key topic of budgeting & defining terms used
  - Also need for organizing documents

VI. Important Questions:
1. **Will borrowers know to pursue mediation?**
   - Is the process too complex? Are they too disadvantaged as negotiators?
2. **Who oversees the mediation outcome?**
   - Are lenders/servicers accountable? To whom?
3. **Is mediation a backstop to HAMP modifications?**
   - Should borrowers attempt a HAMP modification first?
4. **What is the role of 3rd party counseling and/or education?**
   - Counseling to obtain advice
   - Education to construct a budget and understand terms.
     - How can information best be provided?
     - What can be done given serious resource limitations?

Exhibit 3

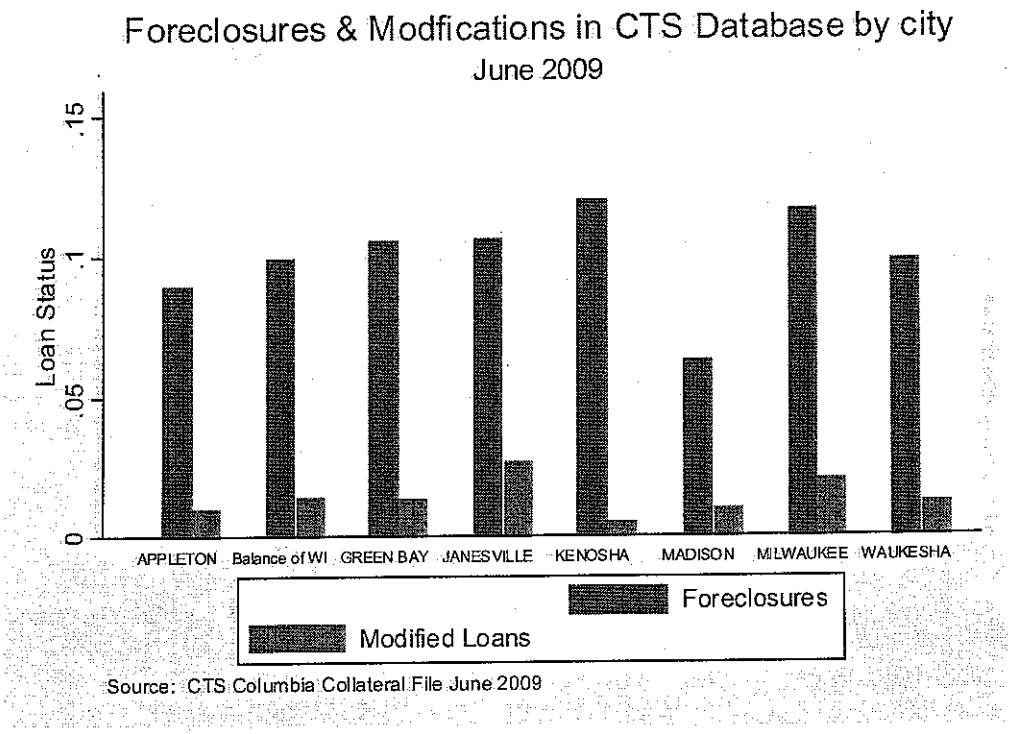


Exhibit 4

	3 Digit Zip	# Loans	% modifications as of Aug 2009	% 90 day + del	% Lender Loss Mitigation in place	% Foreclosure Initiated
Milwaukee	532	6,368	0.5%	9.9%	0.4%	11.5%
Milwaukee	531	3,210	0.7%	7.7%	0.4%	10.6%
Milwaukee	530	2,290	0.5%	7.2%	0.3%	7.7%
Madison	535	2,005	0.6%	7.7%	0.4%	10.1%
Oshkosh	549	1,372	0.7%	6.3%	0.1%	11.0%
St Paul	540	876	0.6%	7.9%	0.2%	13.1%
Racine	534	808	0.6%	9.2%	0.3%	9.7%
Wausau	544	799	0.6%	6.1%	0.0%	11.8%
Green Bay	541	772	0.9%	5.7%	0.4%	9.8%
Madison	537	729	0.5%	5.2%	0.4%	7.2%
Green Bay	543	729	0.5%	5.6%	0.1%	11.1%
Spooner	548	718	0.6%	5.3%	0.7%	11.7%
Portage	539	715	0.8%	8.7%	0.3%	12.4%
Eau Claire	547	582	0.9%	8.1%	0.3%	12.4%
La Crosse	546	490	1.8%	8.0%	0.2%	10.1%

Source: CTS August 2009 File, Wisconsin Loans with Zip Codes

University of Wisconsin-Extension

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Milwaukee County Cooperative Extension
And
Milwaukee Foreclosure Partnership Initiative Project Manager,
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I. Mediation Programs:
   a. Court Appointed Foreclosure Mediation provides another tool for homeowners to negotiate a settlement alternative with their lender.
      i. Successful outcomes cannot simply be measured in terms of homeownership retention.
      ii. Mediation will allow homeowners to review all options and those which will provide for optimal financial impact given their individual circumstances.
      iii. This may not include retention of their home. Mediation will allow thoughtful consideration to each available option.
   b. Need in Wisconsin:
      i. The majority of local foreclosures are being instituted by out-of-state lenders and servicers.
      ii. Borrowers have suggested challenges in communicating with these lenders.
   c. Through a Court Appointed Foreclosure Mediation Program, lenders are compelled to come forward in a timely manner to negotiate a settlement.

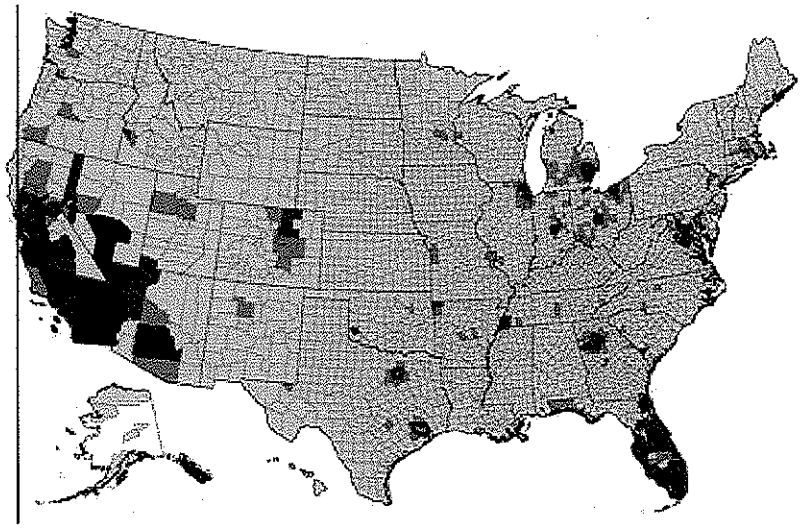
II. Milwaukee Foreclosure Mediation Program:
   a. History and roles: Recommendation of Milwaukee Foreclosure Partnership Initiative launched by Mayor Tom Barrett in September of 2008.
   b. Committee dedicated to model formulation, implementation and continued evaluation.
   c. Reached in excess of 200 requests by homeowners for mediation.
      i. Double what was projected for Milwaukee.

III. Critical components of a successful model include:
   i. A designated program administrator
   ii. Dedicated committee to create model, implement and evaluate on a continual basis
   iii. Staffing for adequate number of eligible and trained mediators, case management and administration
   iv. Foreclosure counseling prior to mediation to evaluate individual circumstances, possible options and sustainable outcomes
   v. Homeowner legal advocacy option through pro bono attorney representation
   vi. Revenue generation for program sustainability
   vii. Designated system for intake, forms, case management, referrals to identified eligible counseling agency and homeowner legal representation
   viii. A system to track and evaluate outcomes identified

IV. Role of Cooperative Extension in Foreclosure Programming:
   i. Provide research based knowledge and best practices to community and key stakeholders for informed decision making and strategy formulation in response to foreclosure crisis. Education outreach to consumers and professionals, capacity building and resource development.
   ii. Key partner in local and state events including the 4th in a series of statewide professional conferences on foreclosure and best practices entitled "Foreclosures in Wisconsin: Responses and Resources for Living Beyond the Bubble" being held on November 5, 2009 at the Clarion Hotel & Conference Center, Milwaukee.
   iii. Leadership in foreclosure intervention event planning, implementation and evaluation.

County by county, the number of foreclosure actions — default notices, auctions and repossessions — per 1,000 households.

0 - 20 | 20.1 - 40 | 40.1 - 60 | More than 60

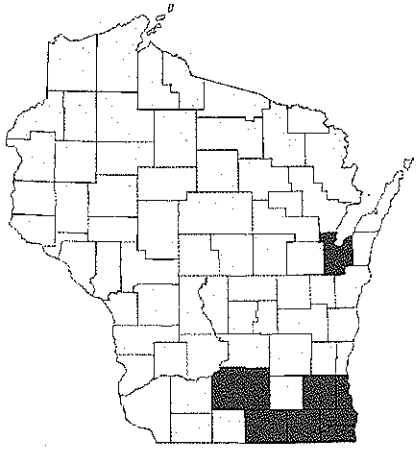


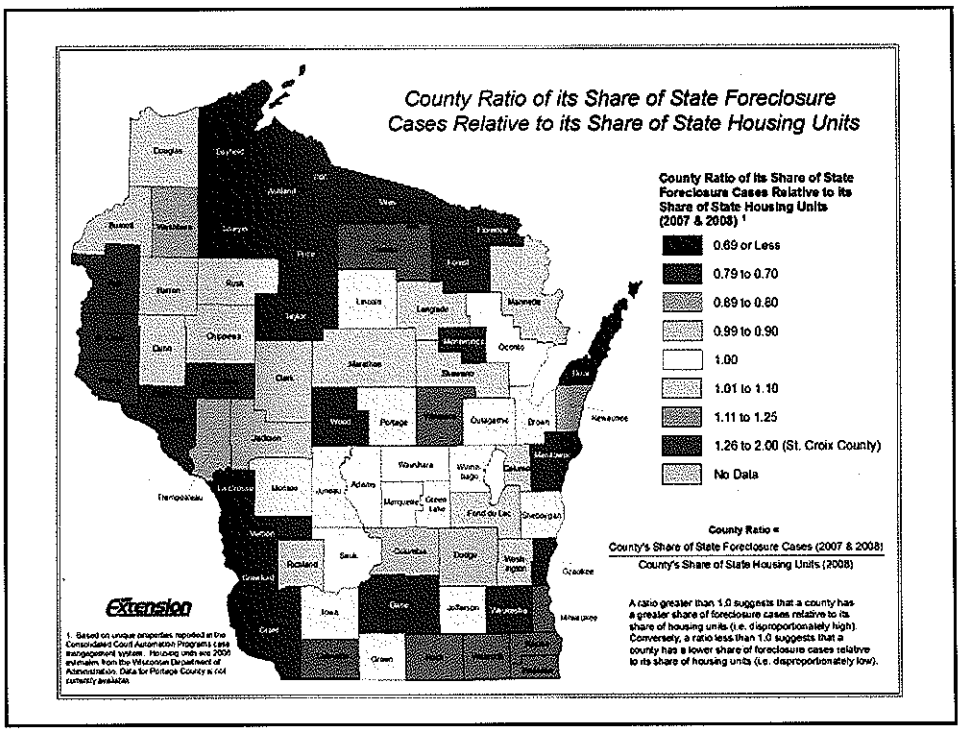
Source: USA Today, 3-10-09

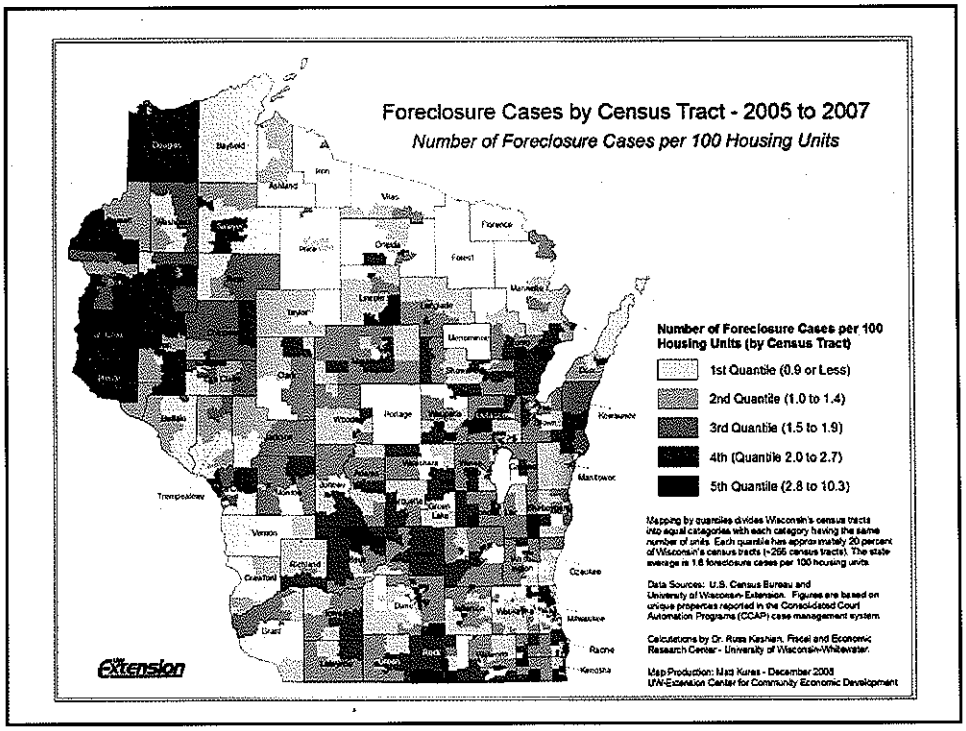
Counties with >50 case increase & >20% Increase 2007 to 2008

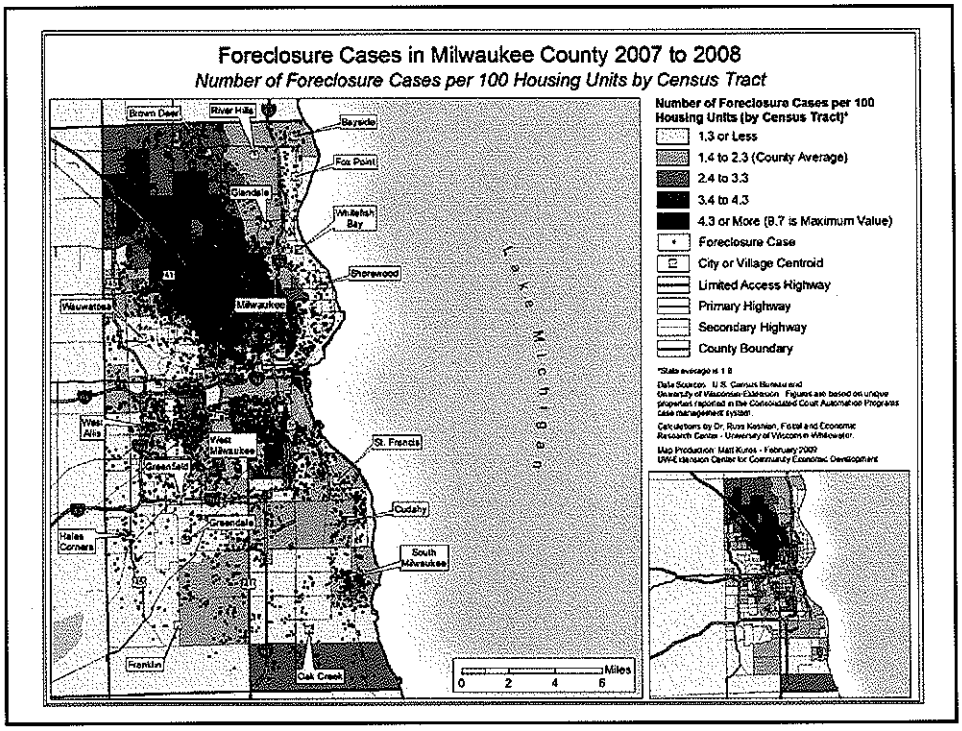
Eight Counties Accounted for 61% of the State's Increase

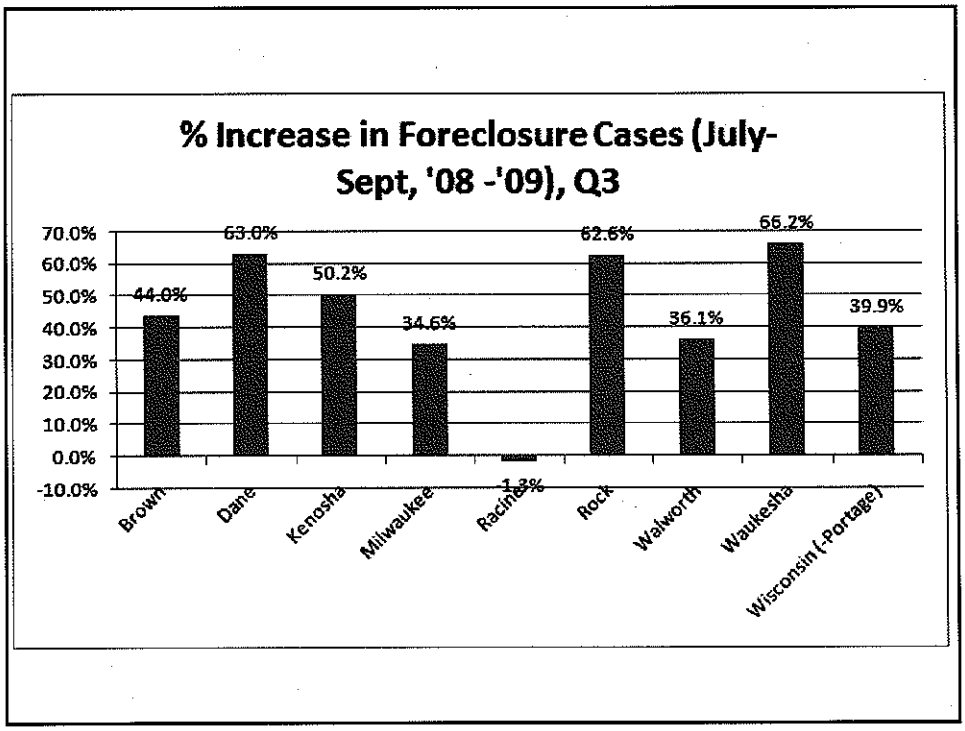
- Brown
- Dane
- Kenosha
- Milwaukee
- Racine
- Rock
- Walworth
- Waukesha



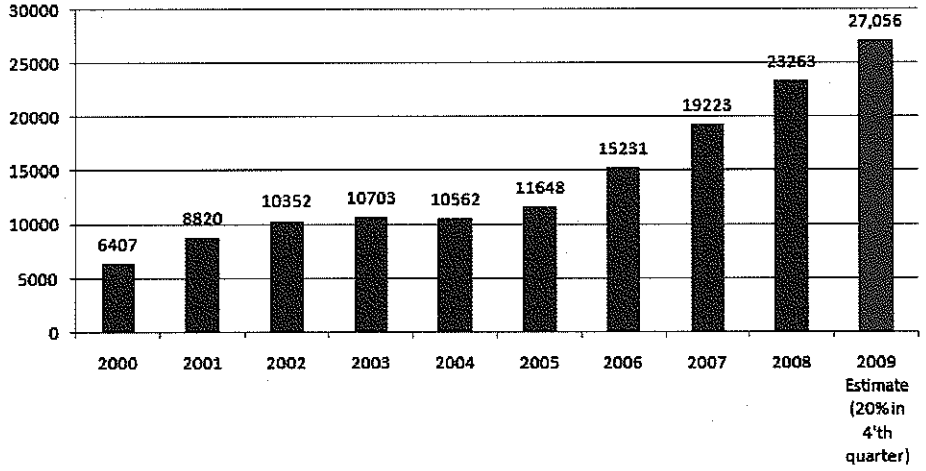

County Ratio of its Share of State Foreclosure Cases Relative to its Share of State Housing Units
County Ratio of its Share of State Foreclosure Cases Relative to its Share of State Housing Units (2007 & 2008) 1
0.69 or Less
0.79 to 0.70
0.89 to 0.80
0.99 to 0.90
1.00
1.01 to 1.10
1.11 to 1.25
1.26 to 2.00 (St. Croix County)
No Data
County Ratio =
County's Share of State Foreclosure Cases (2007 & 2008)
County's Share of State Housing Units (2008)
A ratio greater than 1.0 suggests that a county has a greater share of foreclosure cases relative to its share of housing units (i.e. disproportionately high). Conversely, a ratio less than 1.0 suggests that a county has a lower share of foreclosure cases relative to its share of housing units (i.e. disproportionately low).
Extension
1. Based on unique properties reported in the Consolidated Court Automation Programs case management system. Housing units are 2008 estimates from the Wisconsin Department of Administration. Data for Portage County is not currently available.


Foreclosure Cases by Census Tract - 2005 to 2007
Number of Foreclosure Cases per 100 Housing Units
Number of Foreclosure Cases per 100 Housing Units (by Census Tract)
1st Quantile (0.9 or Less)
2nd Quantile (1.0 to 1.4)
3rd Quantile (1.5 to 1.9)
4th (Quantile 2.0 to 2.7)
5th Quantile (2.8 to 10.3)
Mapping by quantiles divides Wisconsin's census tracts into equal categories with each category having the same number of units. Each quantile has approximately 20 percent of Wisconsin's census tracts (=255 census tracts). The state average is 1.6 foreclosure cases per 100 housing units.
Data Sources: U.S. Census Bureau and University of Wisconsin-Extension. Figures are based on unique properties reported in the Consolidated Court Automation Programs (CCAP) case management system.
Calculations by Dr. Russ Kashian, Fiscal and Economic Research Center - University of Wisconsin-Whitewater.
Map Production: Matt Kures - December 2008
UW-Extension Center for Community Economic Development
Extension

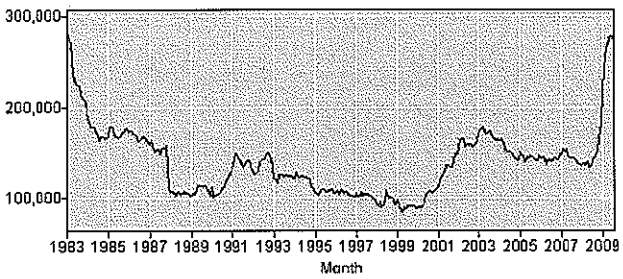

Foreclosure Cases in Milwaukee County 2007 to 2008
Number of Foreclosure Cases per 100 Housing Units by Census Tract
Number of Foreclosure Cases per 100 Housing Units (by Census Tract)*
1.3 or Less
1.4 to 2.3 (County Average)
2.4 to 3.3
3.4 to 4.3
4.3 or More (8.7 is Maximum Value)
Foreclosure Case
City or Village Centroid
Limited Access Highway
Primary Highway
Secondary Highway
County Boundary
Lake Michigan
Miles
0 2 4 6


% Increase in Foreclosure Cases (July-Sept, '08 -'09), Q3
70.0%
60.0%
50.0%
40.0%
30.0%
20.0%
10.0%
0.0%
-10.0%
44.0%
63.0%
50.2%
34.6%
-1.3%
62.6%
36.1%
66.2%
39.9%
Brown
Dane
Kenosha
Milwaukee
Racine
Rock
Walworth
Waukesha
Wisconsin (-Portage)

of Foreclosure Cases in Wisconsin (without duplicates) 2000-2009

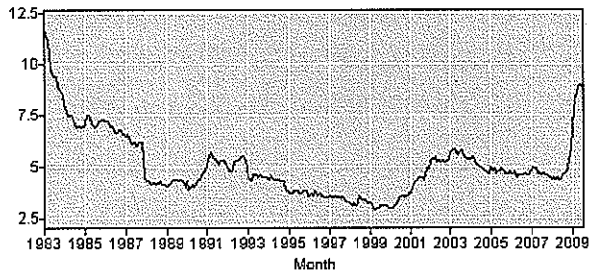


unemployment



Source: Bureau of Labor Statistics, http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=latest_numbers&series_id=LASST55000003

unemployment rate



Jan	7.0%
Feb	7.8%
March	8.5%
April	8.6%
May	8.9%
June	8.9%
July	9.0%
Aug (p)	8.9%

For More Information:

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Current Data:
http://tinyurl.com/wiforeclosures

UW Extension
Cooperative Extension

Community Bankers
of Wisconsin

Joint Public Hearing of the
Senate Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing
and Assembly Committee on Housing

2009 SB 255

October 7, 2009

Testimony of Richard McGuigan, Executive Vice President
Community Bankers of Wisconsin

Thank you Senator Taylor, Representative Young and Members of the Senate and Assembly Committees. My name is Rick McGuigan. I am the Executive Vice President of the Community Bankers of Wisconsin (CBW). CBW is a statewide banking trade association representing the interests of approximately 210 community banks doing business in 900 offices across Wisconsin.

I appear before you today to testify for information only on Senate Bill 255. In addition I would like to speak in support of Amendment 1 (or Senate Amendment 2) to SB 255.

Community Bankers of Wisconsin (CBW) understands the well-meaning intent of the authors of this bill. Foreclosures have a negative financial and emotional impact on both borrowers and even lenders. According to ForeclosureAlarm, a Madison-based foreclosure data company, Wisconsin had a record number of foreclosures in September 2009. Year to date in 2009 Wisconsin through September, increased 14% over the record number of foreclosures in 2008. The reasons for this continuing increase are numerous and varied.

In some cases economic conditions beyond the homeowner/borrower's control, such as plant layoffs, reduced sales, and reduced hours of work, have resulted in a borrower's inability to keep their mortgage payments or other financial obligations current. In other cases, loose underwriting standards reflected in riskier loans that were alternatives to "prime" loans, commonly known as

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"Alt-A" (or alternatives to A-paper), including "stated income" loans, "stated assets" loans, "no document" loans, "low document" loans and other types of "sub-prime" mortgage products enabled marginally qualified or non-qualified homeowner/borrowers to obtain mortgage loans. It is important to note that the bank regulatory agencies are in agreement that very few community banks engaged in these riskier loans, but rather were more cautious in their underwriting standards. And, finally, in some cases fraud and/or collusion was committed by borrowers, mortgage brokers, and/or real estate brokers.

In spite of the record number of foreclosures, independent third party analysis from reputable companies such as RealtyTrac.com and ForeclosureAlarm have consistently shown that Wisconsin community banks have not used foreclosure procedures abusively, but rather have used foreclosure as the remedy of last resort to collect mortgage loans that are in default.

Since the reasons for the current mortgage "crisis" are so varied, it is extremely difficult for a legislature to craft a "one-size fits all" solution to assist qualified homeowners/borrowers during a temporary economic difficulty. However, CBW is supportive of efforts that help identify and respond to those parties that have engaged in irresponsible or abusive practices while at the same time providing some measure of relief to homeowners who have a realistic plan and capacity to work through their economic difficulties.

Will SB 255 as currently proposed help stop foreclosures for borrowers who will ultimately be able to work out of temporary financial problems? If the proposed legislation only delays an inevitable foreclosure, then the legislation does not accomplish its primary goal – to reduce the number of foreclosures in Wisconsin, **and** help keep people in their homes. CBW believes that the best solution to reduce foreclosures is for lenders and homeowners to work together to determine first if the borrower has a realistic plan and ability to overcome their financial difficulties, and then second to jointly develop a strategy to implement the plan. The strategy could include loan modifications, altered terms, and in some instances loan forbearance, and possibly as a last remedy, debt forgiveness.

Community banks in Wisconsin already work with distressed homeowners/borrowers.

Community banks in Wisconsin did not engage in the questionable underwriting standards as exemplified in Alt-A and other high-cost mortgage loans. Community banks in Wisconsin have shown by their actions that they consider foreclosure as the remedy of last resort in dealing with mortgage loans that become Past Due. In fact, even in those cases where community banks file foreclosure actions, the **average amount of time the mortgage is unpaid** before the community bank conducts a Sheriff's Sale is **340 days**. According to ForeclosureAlarm less than 6% of the foreclosure filings in Wisconsin result from community bank foreclosure actions. Moreover, ForeclosureAlarm's analysis of foreclosure filings in Wisconsin reveal that **large out-of-state financial institutions and unregulated lenders** account for more than 60% of all Wisconsin foreclosures.

CBW believes that Amendment 1 (or Senate Amendment 2) to SB 255 recognizes the extraordinary efforts that community financial institutions are already taking to avoid foreclosure actions. Many community banks believe it is extremely important for mortgage borrowers to have a local contact in case the borrower has questions or financial problems, and consequently a number of community banks also service the loans the sell into the secondary market. Those community banks use the same standards when dealing with serviced loans in default that they use for the loans they hold in-house. Therefore it is appropriate to include both held and serviced mortgage loans in calculating if the exemption applies to a specific financial institution. Moreover the language in the exemption would be then be consistent with the mediation notice requirement in sub. (2) which applies to both held and serviced loans.

In conclusion, objective research has shown that Wisconsin community banks have worked with their customers to avoid foreclosure actions and have helped keep borrowers in their homes. Senate Amendment 1 (or Senate Amendment 2) recognizes those efforts and places the emphasis for mediation on those financial institutions that have possibly used foreclosure as an inappropriate collection tool.

Thank you for your time.

Community Bankers
of Wisconsin

Joint Public Hearing of the
Senate Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing
and Assembly Committee on Housing

Senate Bill 255

October 7, 2009

Testimony of Russ Kuehn, Chairman, First National Bank of Berlin
and Chairman of Community Bankers of Wisconsin

Senator Taylor, Representative Young and Members of the Senate and Assembly committees. My name is Russ Kuehn, Chairman of the First National Bank of Berlin. First National Bank of Berlin is a community bank with $253 million in assets and operates eight banking offices in the counties of Dane, Green Lake, Marquette, Waushara and Winnebago.

I also have the honor of serving this year as the Chairman of the Community Bankers of Wisconsin (CBW). CBW is a statewide trade association representing the interests of approximately 210 community banks doing business in 900 offices across Wisconsin.

Thank you Senator Taylor and Representative Young for allowing me to appear before your committees to testify for information only on Senate Bill 255. In addition, I would like to speak in strong support of Senate Amendment 1 (or Senate Amendment 2) to Senate Bill 255 offered by Senator Erpenbach.

These are unprecedented times in the financial services industry and we appreciate the opportunity to provide information on the issue of mortgage foreclosures and the impact it is having on families, lenders and our communities.

As background, in Wisconsin, approximately 96 percent of the banks headquartered in the state are community banks using the definition of those under $1 billion in total assets. In fact, 73 percent of the community banks in Wisconsin have under $250 million in assets. Community banks provide vital consumer, small business, agricultural, commercial and mortgage credit to their communities.

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With respect to the focus of today's hearing on SB-255 related to mortgage mediation community bankers believe the primary mechanism to avoid mortgage foreclosures is to properly underwrite loans and not place consumers in loans that they cannot afford for the long-term. It makes no economic sense to make adjustable low rate teaser mortgage loans that reset to higher rates that become unaffordable to the homebuyer. According to a study by Madison-based ForeclosureAlarm during the first six months of 2009 all of the Wisconsin community banks combined accounted for only 6 percent of the statewide foreclosure filings.

The goal of SB-255 that community banker's support is to prevent foreclosures by bringing together borrowers and lenders through the mediation process. Mediation works when communication is improved between interested parties. Everyday community bankers communicate with our customers to help solve financial problems. We know our customers by name and providing personal service is our objective.

Community banks have several incentives to maintain strong underwriting standards. First, community banks have to view their loans from a long-term perspective. The banks health depends on the health of its community. Mortgages that fall into default may have generated fee income up front, but at the expense of local home values and the bank's reputation. Second, bank examiners criticize community banks if they make mortgage loans that borrowers will be unable to repay.

Senate Amendment 1 (or Senate Amendment 2) to SB-255 offered by Senator Erpenbach will exempt financial institutions from foreclosure mediation with offices in Wisconsin that have a track record of few foreclosures. Under Senate Amendment 1 (or Senate Amendment 2) financial institutions would be exempt from the mediation requirement if within a 12-month period preceding the commencement action to foreclose, the financial institution obtained 5 or fewer foreclosures or does not exceed 3 percent of first or second mortgages held or serviced.

In other words to be exempt from SB-255 the financial institution would have to less than 1 foreclosure judgment every two months or 97 percent or higher of the loans held or serviced performing. We believe if a financial institution meets these very low foreclosure judgment thresholds they are already making high quality loans and are working closely with their customers to avoid foreclosure.

Thank you again for the opportunity to appear before your committee.

WISCONSIN BANKERS ASSOCIATION

Testimony of the Wisconsin Bankers Association
before the
Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing and the
Assembly Committee on Housing

For Information on Senate Bill 255

10:00 a.m., October 7, 2009

Thank you, Chair Taylor, Chair Young, and Committee Members. My name is Rose Oswald Poels and I am senior vice president and counsel with the Wisconsin Bankers Association (WBA). WBA was founded in 1893 and represents nearly 300 bank and thrift institutions and their 30,000 employees. WBA represents the smallest bank in Wisconsin, the largest bank in the state, and just about every bank in between.

Appearing with me is John Topczewski, vice president of Johnson Bank in Racine. Mr. Topczewski is the current chair of the Wisconsin Bankers Association Government Relations Committee and is involved in many different aspects of WBA's many member educational programs.

We are testifying today for information only on Senate Bill 255. WBA greatly appreciates the ongoing dialogue we have had with Senator Taylor and her staff over the last several months as she has been working on this language. The banking industry obviously is impacted by this legislation and Senator Taylor has been very willing to listen to our concerns and try to address them in the bill.

As you know, there are many players involved in the mortgage process, from beginning to end, and all play different roles. The process begins with a lender making a loan and if that loan is sold, there is typically both an investor and a servicer. If a loan is packaged up with other loans and turned into a mortgage-backed security, you may find a financial institution in the role of a trustee of mortgage-backed securities.

While only the negative stories are publicized in the media, Wisconsin's community banks, from the smallest to the largest, have been working every day with their customers who may be struggling to find alternatives to foreclosure. Communication between these two parties is occurring whenever possible.

Financial institutions have modification programs of their own, or are participating in one of the three programs offered nationally – the Administration's Home Affordable Modification Program, or Fannie Mae or Freddie Mac's Refinance Programs. Other financial institutions have self-imposed foreclosure moratoriums. Still other financial institutions are working through the court-established programs in Milwaukee and Iowa Counties (and others as those are developed).

Certainly, there are varying personal reasons why someone is no longer able to make their mortgage payment. As a result, it is difficult to say whether a bill such as

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SB 255 will have any different effect on the current outcomes individuals are experiencing than what is already occurring in the marketplace and as a result of federal laws and regulation.

Over the last year, a lot of public attention has been given to this topic and it has resulted in an inordinate amount of calls into our member financial institutions and loan servicers. Our members have told us that in some situations, almost 40% of these calls are coming from customers who are current on their mortgage, foresee no immediate change in their financial situation, and are just trying to get a better interest rate on their mortgage loan. The drain on a financial institution's human resources to respond to all these varying types of calls has been significant. As a result, not every individual situation has been handled perfectly. Managing customer expectations continues to be challenging; however, it is critical to note that our member financial institutions **are** communicating with all of their customers.

Part of the purpose of SB 255 is to require a notice of default be sent to the borrower if the borrower fails to make full payments for two consecutive payment periods prior to filing a foreclosure action. There are also several defined terms at the beginning of SB 255. WBA does have some operational and other questions with regard to certain definitions and the notice of default language, many of which WBA shared with Senator Taylor's office previously, that WBA would like to see resolved before SB 255 moves forward. These issues are itemized below in no particular order.

1. Both the first mortgage loan and second mortgage loan definitions state they mean a "loan on residential real property...". That is awkward language and WBA is not sure what is really meant by that. It would be preferable if these definitions were re-worked to make it clear that what they really mean is a loan secured by residential real property (either first lien or second lien), etc.

2. The second mortgage loan definition specifically states it is meant to include any renewal or refinancing of a second mortgage loan; however, the same language is not in the first mortgage loan definition. Are renewals and refinances intended to be caught in the first mortgage loan or not?

3. The notice of default in this bill is triggered based on missing two consecutive payment periods. Is it safe to assume that if the terms of the loan documents allow for a default for other reasons (which they commonly do, such as failure to pay taxes, etc.), that the lender may go ahead and foreclose and is not required to send the notice? WBA is concerned that the language in the bill would actually preclude a foreclosure for a lender until there has been a two month default which is very problematic. This should be clarified. In addition, must a lender send a notice every time a borrower misses two consecutive payments even if the lender has no intention at that time to file a foreclosure action? This section requires the notice be sent no later than 45 days after the due date for the 2nd payment period yet a lender may not know at that point if it will file a foreclosure action. Among other issues, this causes timing problems.

4. In this same section on page 3, beginning at line 21, it requires the lender to also make a good faith effort to "speak" to the borrower. This requirement is very problematic in many ways and ideally should be removed. First, what is meant by "speak" – does that mean verbal conversation directly with the person? What if the person refuses to take phone calls? Can you leave messages on a voice mail or answering machine? That may cause issues for financial institutions because of the privacy laws they must follow. It would be preferable if this requirement were removed.

5. On page 4, Lines 1-10 set forth the requirements for the content of the notice of default. One of the items required is a legal description. WBA questions whether this is necessary or even helpful to a borrower at this point in the process given the length and detail in a legal description. Is it sufficient to simply reference the property address?

6. On page 4, line 14, WBA would prefer it to read "action without prejudice and may charge the mortgagee with costs, including the borrower's attorney".

The other primary purpose of SB 255 is to require that a defendant be given notice about their right to mediation and if it is requested by either party, the mediation process outlined in the bill must occur. Such a notice by itself does not seem unduly burdensome, however WBA does have some concerns, many of which it has previously shared with Senator Taylor, about the specific requirements and process for mediation that is outlined in the bill and questions whether such definition is really necessary. These issues are itemized below in no particular order.

1. The references to the number of days throughout the bill are troublesome and inconsistent. In some cases, it refers to "X working days" while in other cases, it says "X days." In addition, what is meant by a "working day?" Is that term defined elsewhere in the law or in common law? It would be preferable if this could be clarified and made consistent.

2. WBA is very concerned that when aggregating the total number of days for the entire process as set forth in the bill, it is too long. According to WBA's rough math, it could be as much as a 140-day delay in the foreclosure process.

3. Coinciding with the notion that the mediation time frames set forth in the bill are too long, is the need to also allow for the redemption period to be reduced from 6 months to 3 months if a deficiency is waived. The bill does provide helpful relief on page 11 by reducing the redemption period from 12 months to 6 months if a deficiency is not waived. However, it should also provide the same relief if a lender chooses to waive a deficiency judgment. This should be added to the provision beginning on page 11, line 11. This could be accomplished by adding the following language to line 14 on page 11: "is entered, or if the creditor elects to waive deficiency then 3 months."

4. There are lots of provisions about "good faith" in the bill, and consequences if a party does not act in good faith. However, that term is not defined

anywhere except beginning on page 9 at line 19 where it says it includes certain items. Is this list meant to be exclusive or just inclusive? WBA also wonders if it is typical for a finding of bad faith to be made by a mediator during the normal course of mediation. WBA is concerned that such a requirement could put mediators in an unusual position that is contrary to the purpose of mediation.

5. In addition, on page 10, if the court finds that the mediator's determination of bad faith was in error, the court is supposed to order the mediator to continue the mediation. This too seems to be contrary to the purpose of mediation because isn't the mediator now tainted as a result of their determination? WBA believes it would be fairer to permit the parties to request a different mediator at that point.

6. It is also important to note that servicers are at the mercy of the requirements prescribed by their investors. So to the extent that the mediation is actually occurring with a servicer, it will be impossible for a representative from a servicer to be able to "fully settle, compromise or otherwise mediate the matter" immediately during a mediation session. Binding an investor to items discussed during a mediation session will require the representative from the servicer to follow the terms of its contract with the investor, which may take some time to achieve. This fact should not constitute a failure to mediate in good faith. There simply is no other way to conduct mediation with a servicer than to allow that representative some time to obtain approval as needed from an investor.

7. WBA has further concerns about one of the provisions constituting a lack of good faith on page 10, lines 3 and 4. This essentially states that the failure of a party to consider debt restructuring alternatives and to provide a written statement as to why debt restructuring alternatives are unacceptable constitutes a lack of good faith. The meaning of this provision is open to interpretation and a lender should be able to simply state that it declines to agree to debt modification without anything more, and not be considered to be acting without good faith.

WBA is very pleased that this bill contains a sunset provision since it understands that the intent for this bill is tied to the current mortgage foreclosure crisis we are experiencing and not any longer term problem.

WBA wishes to thank all of the committee members today from both houses for your careful consideration of the information we have provided today. Again, WBA wants to sincerely thank Senator Taylor and Representative Young for their outreach to our industry and for carefully listening to our concerns over the last several months on this matter. We are happy to take any questions you may have of us at this time or at any other time. Thank you.

Alternative Dispute Resolution Section

State Bar of Wisconsin
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October 7, 2009

TO: Assembly Committee on Housing
Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform and Housing

FR: Attorney Kathleen Baird
Chair, ADR Section

RE: SB 255

The Alternative Dispute Resolution (ADR) Section of the State Bar of Wisconsin is comprised of attorneys and judges who are devoted to promoting development and use of alternative methods of dispute resolution; encouraging acceptance of ADR among lawyers, courts and the public; training mediators and arbitrators in ADR techniques, and lawyers as ADR advocates; assisting practitioners in their pursuit of careers in ADR; cooperating and coordinating activities with other ADR organizations; and informing lawyers and ADR service-providers on developing standards for ADR practice.

The ADR Section offers the following thoughts and comments regarding Senate Bill 255.

MEDIATORS AND FINANCIAL ANALYSIS. Sec. 846.03(5)(b) and COMPENSATION. (Page 7)
The compensation scheme raises many questions. It provides that the mortgagee pay the mediator for travel and necessary expenses. The mortgagee may then recover the costs by adding such cost to the borrower's periodic payments, but only if they mediate in good faith. If the borrower fails to mediate in good faith, they are obligated to pay the mediator. The exact language follows:

> (b) The mortgagee shall compensate mediators and financial analysts for travel and other necessary expenses in amounts the director approves. A mortgagee may recover the costs of compensating any mediator and financial analyst used in the mediation by adding that cost to the periodic payments made by the borrower on the first or 2nd mortgage loan. A mortgagee may not recover the costs of compensating mediators and financial analysts under this paragraph if the mortgagee does not mediate in good faith. If a mortgagee mediates in good faith but the borrower does not mediate in good faith, the borrower shall compensate any mediator and financial analyst used in the mediation. Sec. 846.03(5)(b).

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Mediators may not charge fees that may impair their impartiality. For example, a mediator cannot enter into a fee agreement that is contingent upon the result of the mediation. (Model Standards of Conduct for Mediators, August, 2005, American Bar Association, American Arbitration Association, and the Association for Conflict Resolution). Here, the result of the mediation directly influences the fee. If there is no settlement, the case will proceed to confirmation, the lender will take ownership of the property, and there will be no periodic payments. Does that mean the lender, who cannot recover from the borrower, is not required to advance fees to the mediator? Mediators seeking to collect fees from participants will likely no longer be perceived as impartial and may need to remove themselves from the process.

Another question arises from the "good faith" provision. The mediator fees are affected by that same mediator's determination of whether a party has failed to mediate in good faith. Even if the mediator makes the determination of "good faith" without considering how it affects fees, the appearance that the mediator lacks impartiality could weaken the process.

This leads to a discussion surrounding the good faith provision.

5. REQUIRMENT THAT PARTIES NEGOTIATE IN GOOD FAITH.

Sec. 846.03(6)(h) establishes a requirement that the parties mediate in good faith. Good faith requires that the parties attend the mediations sessions; provide full financial information; participate in the mediation with sufficient settlement authority and substantiate the reasons for declining debt restructuring options. sec. 846.03(h).

Secs. 846.03(6)(i)-(j) create a process for determining whether the parties have, in fact, mediated in good faith. The process begins with a determination by the mediator, put forth in an affidavit and submitted to the director, that one of the parties has not acted in good faith. The party may challenge the finding by motion to the court, which then holds an evidentiary hearing on the matter.

Secs. 846(3)(k) sets forth consequences for failing to mediate in good faith. If the borrower has been found to have not acted in good faith, the mortgagee is entitled to immediately proceed with any legal remedies to foreclose the mortgage and the borrower is required to compensate the mediator and the financial analyst for all of their costs. If the mortgagee is found to have not acted in good faith, the court may supervise the mediation and may delay the foreclosure action by 180 days. Also, the mortgagee is then required to pay costs of the mortgag[or] for the enforcement motion. [error in text]

Mediator neutrality is at risk once they become enforcers of a good faith requirement. To answer the question, "Is a party negotiating in bad faith?" requires the mediator to make judgment about what constitutes reasonable compromises. For example, what if the mortgagee refuses to consider the homeowners' counterclaims of unconscionability or deceptive trade practices. Is that bad faith? What if the homeowner fails to attend the mediation for unsubstantiated reasons? Is that bad faith? Once the mediator begins to formulate answers to those types of questions, neutrality will be affected.

The other problem is the provision's effect upon confidentiality. To enforce the "good faith" requirement, the mediator would have to break confidentiality by disclosing specifics about negotiations, proposals, parties' behavior and conversations during mediation. The mediator would have to submit evidence, either in testimony or in affidavit. This undermines the statutory confidentiality provided in sec. 904.085, Wis. Stats. In addition, there is significant concern that this would have a chilling effect upon the parties' willingness to disclose their views and interests during the mediation session.

Another consideration is whether enforcement of sec. 846.03(6)(h)-(k) would spawn a completely new layer of litigation. Would the finding involve a full evidentiary hearing so the party against whom bad faith is asserted has an opportunity to contest it with their own evidence? Is the mediator's conclusion given greater

deference? If that is the case, is there a due process concern? What is the standard of review of the mediator's determination? Is this interim order by the court subject to appeal?

Under 846.03(6)(i), if a court disagrees with a mediator's finding of bad faith, the court sends the case back to that same mediator to continue the mediation. It is not likely that either party will have the requisite level of trust to engage in mediation with that particular mediator in a meaningful way after allegations of bad faith.

Finally, it is not clear what is envisioned under 846.03(6)(k) by court supervised mediation. Does the judge actually attend the mediation session? Does the judge require detailed reports of the sessions? In addition, do these "good faith" enforcement provisions have the potential of increasing court caseloads in direct opposition to one of the policy goals of foreclosure mediation?

How does court supervised mediation relate to the aspect of confidentiality? Sec. 846.03(5)(d) requires mediators to keep confidential all information and records obtained in performing their duties as mediators. This conflicts with the provision that requires mediators to inform the director, by affidavit, that a party has failed to act in good faith.

The ADR Section thanks Senator Taylor and Representative Young for their work on this bill as well as the many other legislators who are actively trying to find solutions to the housing crisis in Wisconsin. We appreciate the time and effort by all committee members to hear testimony on this bill. We offer our assistance to you as you continue to deliberate on this bill and ADR issues in general. Thank you for your time and consideration.

If you have questions about this memorandum, please contact Sandy Lonergan, Government Relations Coordinator, at slonergan@wisbar.org or (608) 250-6045.

LENA C. TAYLOR
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Testimony of Senator Lena C. Taylor
SB 255 – Mortgage Mediation Act
Assembly Committee on Housing
Senate Committee on Judiciary, Corrections, Insurance,
Campaign Finance Reform, and Housing
October 7, 2009

Honorable Chairman Young, Assembly and Senate committee members,

It is my pleasure to address you in support of SB 255 – The Mortgage Mediation Act. This bill, which has been the product of much dialogue with housing experts, mediators, financial services professionals, and the Judicial System, is brought to you today as key beginning point in creating a workable and operating mediation system to reduce foreclosures where possible and expedite resale of properties where the lender and owner can agree.

Wisconsin is not a stranger to the foreclosure crisis. Since the economic recession begin in 2008, Wisconsin has seen a steady increase in foreclosures verses past years. Just reported numbers for the Southeastern Wisconsin show an 11% increase in just one month from August to September. While many of the loans going to default and foreclosure as a result of sub-prime lending have likely begun that process, experts indicate that unemployment will now drive the new round of foreclosures. We can all agree that unemployment has not gone down and families will face serious crises shortly.

The Mortgage Mediation Act is designed to interject an essential time for communication between all parties into the foreclosure process. Communication is the most essential component for all parties when facing a financial situation like foreclosure. Lenders will assert today that one of the most destructive things that can happen in a financial crisis is for a borrower to stop communicating with the institution. And borrowers often find harsh and demanding tactics and tone to not be a helpful method of communicating with institutions about their financial problems. Mediation is a structured method of communication designed to ease tensions where possible and promote civil, productive dispute resolution.

-over-

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Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing (Chair)
Committee on Justice Reinvestment Initiative Oversight (Chair)

Joint Committee on Finance
Joint Committee for Review of Criminal Penalties (Co-Chair)
Committee on Strengthening Wisconsin Families (Co-Chair)

The Mortgage Mediation Act creates a process to allow a borrower who owes a first or second mortgage loan on a residential property to seek mediation when the borrower is in default on the loan and the mortgagee is beginning a mortgage foreclosure action. This process includes notification of default requirements, notification of the right to mediation, provides a referral to qualified credit counselors and financial analysts. This mediation process will require good faith mediation to resolve the situation and when good faith action is broken by either party, it provides a mechanism for the court to leverage compliance into mediation.

Mediation can be a successful tool to prevent a foreclosure from continuing when parties can reach an agreement to cure the default, but it also can be successful at expediting a property to the resale market if foreclosure is appropriate action by shortening the redemption period.

Mediation is happening right now in a very similar program in Milwaukee. You will hear today from mediators and financial experts about that program. You will also hear from our friends at UW-Extension, an agency of the University and the state, that is taking a leading role in this program and one I rely heavily on to inform my decisions on these matters. Extension's statewide capacity to help with financial planning and analysis is a key part of this bill, which I seek to incorporate.

Understandably, while this proposal has gone through significant changes, there may be good ideas yet to be incorporated or other changes that need to made. My office is maintaining of list of those ideas, so that Rep. Young and I can discuss any amendments that need to be made to make this program successful, strong and viable.

I hope that as you hear today from mediation professionals you will come to see the strength of this idea. During the farm lending crisis of the 1980's, this program as enacted in Minnesota, saved over 14,000 farms from foreclosure. That was a huge success in keeping those small businesses viable and operating. With the Mortgage Mediation Act, we can do the same for our homeowners in our districts during this time of unprecedented challenges.

I encourage your support of the Mortgage Mediation Act and thank you for your time.